# INDEX



## CITATIONS





555453—43

# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 352

CONSOLIDATED FREIGHTWAYS, INC., PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court overruling petitioner's motion to quash the information (R. 16) is not reported. The district court overruled petitioner's plea in bar and demurrer (R. 26) without opinion, thereafter rendering judgment for the United States and pronouncing sentence against petitioner (R. 95). The opinion of the circuit court of appeals (R. 121) is not yet reported.

### JURISDICTION

The judgment and order sought to be reviewed were entered by the circuit court of appeals on July 6, 1943 (R. 129). Rehearing was denied on

August 13, 1943 (R. 149). The petition for writ of certiorari was filed on September 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S.C., Sec. 347 (a)).

## QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* precludes prosecution of petitioner (a motor carrier) for unlawful operations after the effective date of an order by the Interstate Commerce Commission specifically denying authority for such operations, the court having, in a previous prosecution involving similar operations prior to such order, sustained petitioner's demurrer to the information and motion to quash.

2. Whether petitioner, holding a certificate of convenience and necessity authorizing certain operations under Section 206 (a) of Part II of the Interstate Commerce Act, may lawfully operate over a highway not specified in such certificate after the Interstate Commerce Commission has denied its application for authority to operate over such highway.

## STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, Part II, Sections 206 (a), 208 (a) and 222 (a), (49 U. S. C., Sec. 306 (a), 308 (a), and 322 (a)), are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

On February 12, 1936, the petitioner filed an application with the Interstate Commerce Commission under the "grandfather" clause of Section 206 (a) of the Interstate Commerce Act, Part II, for a certificate of public convenience and necessity authorizing it to continue operation as a common carrier by motor vehicle in interstate and foreign commerce in and between the states of Oregon, Washington, California, Nevada, Idaho, Montana, North Dakota, and Minnesota over regular and irregular routes (R. 12–13). Thereafter, an amendment to this application was filed specifically requesting authority to engage in operations as a common carrier by motor vehicle between Marmarth, North Dakota, and Miles City, Montana, over U. S. Highway No. 12 (R. 107). The Interstate Commerce Commission, by order dated January 11, 1939, granted much of the application, but specifically denied authority for operation between Marmarth, North Dakota, and Miles City, Montana, over U. S. Highway No. 12 (R. 15).[1]

On May 11, 1938, while petitioner's application under the "grandfather" clause was pending before the Commission, an information was filed

[1] On January 10, 1938, petitioner filed a separate application for a certificate of public convenience and necessity authorizing an extension of its operations to include operations between these two points. This application was likewise denied by an order of the Commission issued January 17, 1941 (R. 92–94).

against petitioner in the United States District Court for the District of North Dakota, charging it with wilfully operating as a common carrier between Marmarth and Miles City in violation of the Interstate Commerce Act on 48 separate days in the latter part of 1937 (R. 27–29). Petitioner filed a demurrer and a motion to quash the information, both of which, after oral argument and the submission of briefs, were sustained by the district court in an order filed on October 26, 1939 (R. 88). The district court filed no memorandum or other opinion.

The present case was instituted by information filed on August 21, 1941, in the United States District Court for the District of North Dakota, charging the petitioner with wilfully operating as a common carrier between Marmarth and Miles City in violation of the Interstate Commerce Act on 117 separate days between March and August 1941 (R. 1–2).[2] The petitioner filed a motion to quash the information, and at the hearing on this motion it was stipulated (R. 9):

> That in the case of Consolidated Freight Lines, Inc., in this Court, criminal cause No. 6664, the practice charged by the Gov-

[2] The information charged illegal transportation from Marmarth to certain stated points in Montana, Idaho, Washington, Oregon, and California, but it was stipulated at the trial "that the practice alleged by the Government to be unlawful is defendant's operation of its trucks over U. S. Highway No. 12 from Marmarth, North Dakota, to Miles City, Montana" (R. 9).

ernment to be unlawful was the same as that charged in this case, the only difference being in the dates of the shipments.

The principal ground of the motion to quash was that the order of the district court sustaining the demurrer to the first information constituted an adjudication of the matter now before the court, and that the second information was therefore barred by the doctrine of *res judicata* (R. 3–7). The motion was overruled, on the ground that the doctrine of *res judicata* was inapplicable, since in the interim between the two sets of alleged violations the Interstate Commerce Commission had ruled on the petitioner's application for authority to operate between Marmarth and Miles City (R. 16–17).

The court likewise overruled a special plea in bar and a demurrer (R. 26), and denied a petition for reconsideration of the order denying the motion to quash (R. 20). The case was tried without a jury upon stipulated facts (R. 89), and resulted in a judgment of guilty (R. 94). The conviction was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit (R. 129).

**ARGUMENT**

1. The general rules governing *res judicata* and estoppel by judgment are clearly settled, and were understood and correctly applied by the court below. Where a question arises in a subsequent

action between the same parties upon the same claim or demand, a judgment upon the merits is an absolute bar to the subsequent action. Where the question arises in a subsequent action between the same parties upon a different claim or demand, *res judicata* comes into play only if the question to be determined in the latter action is the same as that litigated and determined in the original action. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 50; *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. And in suits upon different demands, the inquiry is whether a question in issue in the second proceeding has "under identical circumstances and conditions been previously concluded by a judgment between the parties." *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396.

The court below correctly held that the "precise" question involved in this case had not been raised or determined in the earlier criminal proceeding (R. 128). At the time of the actions charged in the earlier proceeding there was pending before the Interstate Commerce Commission an application by the petitioner for authority to continue operations under the "grandfather" clause, including authority to operate between Marmarth and Miles City. Before the occurrence of the actions charged in the second proceeding this application had been determined adversely to the petitioner, and authority to operate between

Marmarth and Miles City had been specifically denied. The question in the first proceeding, therefore, was whether the petitioner had violated the law by operations during the pendency of an application to the Commission; the question in the second proceeding was whether the petitioner had violated the law by similar operations when no such application was pending before the Commission, and when the earlier application had been specifically denied. The difference between these two questions is obvious.

The petitioner urges that while the pendency of its application before the Commission may have been of relevance in passing upon its motion to quash the information, the demurrer must be treated as a separate motion directed solely to the facts as alleged in the information. However, examination of the briefs filed in the first proceeding (R. 30–88) shows that the demurrer and motion to quash were in effect treated by both parties as a single motion directed to the information, and were argued without distinction as to their respective legal aspects. Under these circumstances, the court below was clearly justified in assuming that the court in dismissing the first information was proceeding on the ground that the pendency of the application to the Interstate Commerce Commission was sufficient to exonerate the petitioner from a charge of criminal violation of the statute.

If it be not clear that this was the issue in the first criminal case, or at least *may* have been regarded by the court as the issue before it, then all that remains is uncertainty as to the precise question before the court in that case. In such circumstances, the doctrine of *res judicata* has no application. "* * * if upon the face of a record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Russell* v. *Place,* 94 U. S. 606, 610. See also *De Sollar* v. *Hanscome,* 158 U. S. 216, 221.

Finally, we submit that the decision of the court below, while plainly correct, is in any event not of such a character as to warrant review by this Court. No conflict with decisions of this Court or of another circuit court of appeals is presented, nor was there any departure from the accepted and usual course of judicial proceedings. There is no occasion for this Court to reexamine the case to determine whether the court below, in applying a well-known rule of law frequently enunciated by this Court, correctly applied it to the particular facts of the particular case then before it.

2. No substantial question is raised by petitioner's argument, on the merits of the case, that under Section 206 (a) of the Interstate Commerce Act it is entitled, without specific authority from

the Commission, to use an alternate highway in the performance of an otherwise duly authorized service.

Section 206 (a) by its terms purports to restrict operations "on any public highway," and carries a clear indication that the Act as a whole deals not merely with the points between which service is effected, but also with the particular highways used between given points. Moreover, Section 208 (a), prescribing the matters which may be covered in a certificate of convenience and necessity, provides that any such certificate "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, * * * and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Clearly, if the Commission may specify not only the fixed termini between which, but also the routes over which, operations may be conducted, it may do so by specifying the particular highways which may be used.[3] This has been the consistent practice of the Commission

[3] As the Commission said in its report denying the petition for authority to operate over U. S. Highway No. 12 between Marmarth and Miles City:

"Clearly it is contemplated that where specified points are to be served, the 'routes over which' the service is to be rendered shall also be named, and we know of no way of describing routes for motor carriers except in terms of highways" (R. 14).

in its administration of the Act, as is indicated by the Commission's report with respect to the petitioner's application in this case (11 M. C. C. 131, 133. See also *J. A. Mannooch Common Carrier Application,* 11 M. C. C. 703, 705.). The administrative construction of a statute by those entrusted with the duty of enforcing it is entitled to great weight, and should not be overturned except for cogent reasons. *United States* v. *American Trucking Assns.,* 310 U. S. 534, 549; *Noble* v. *United States,* 319 U. S. 88, 93.

Section 206 (a) of the Act, under which (with Section 222 (a), prescribing criminal penalties) the present information was filed, specifies that no common carrier subject to the Act "shall engage in any interstate or foreign operation on any public highway" without a certificate of public convenience and necessity. Admittedly, here the petitioner had no certificate of convenience and necessity specifically covering operations over U. S. Route No. 12 between Marmarth and Miles City. Its contention is that, having as it did a certificate of convenience and necessity authorizing service between certain stated points, it was entitled to effect that service by any routes which it saw fit to use, including the particular route used here, without further authority from the Commission. This contention is not supported by

the language of the Act or by any decision of this Court.

This Court has sustained the authority of the Commission under the "grandfather" clause to impose such conditions in a certificate of convenience and necessity as will tend to create "that substantial parity between future operations and prior *bona fide* operations which the statute contemplates." *Alton R. Co.* v. *United States,* 315 U. S. 15, 22. *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 480–481. Unless this authority extends to specifying the particular highways which may be used, a carrier having "grandfather clause" rights to a route between New York and San Francisco, based on service during the "grandfather period" between those points *via* Chicago, Seattle, and Portland, would be entitled to operate *via* Omaha and Salt Lake City or *via* St. Louis and Los Angeles. Such a result would substantially defeat the Commission's authority to establish "substantial parity" between future operations and prior *bona fide* operations.

## CONCLUSION

The decision below is not in conflict with any decision of this Court or with any decision cited in the petition, and presents no issue warranting review by this Court. It is respectfully submitted

that the petition for a writ of certiorari should be denied.

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